

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WILLIE LEE JEFFERSON

Plaintiff,

vs.

ART VOGT, *et al.*,

Defendants.

3:04-CV-0687-LRH (VPC)

REPORT AND RECOMMENDATION
OF U.S. MAGISTRATE JUDGE

July 6, 2007

This Report and Recommendation is made to the Honorable Larry R. Hicks, United States District Judge. The action was referred to the undersigned Magistrate Judge pursuant to 28 U.S.C. § 636(b)(1)(B) and LR IB 1-4. Before the court is defendants' motion for summary judgment (#82). Plaintiff failed to file an opposition. The court has thoroughly reviewed the record and defendants' motion and recommends that defendants' motion for summary judgment (#82) be granted.

I. HISTORY & PROCEDURAL BACKGROUND

Plaintiff Willie Lee Jefferson ("plaintiff"), a *pro se* prisoner, is currently incarcerated in the custody of the Nevada Department of Corrections ("NDOC") at Ely State Prison ("ESP") (#14). Plaintiff brings his first amended complaint pursuant to 42 U.S.C. § 1983 for violations of his Eighth Amendment right to be free from cruel and unusual punishment (#9). Plaintiff names as defendants Michael Budge, former Warden of Nevada State Prison ("NSP"); James Baca, NSP Assistant Warden; Art Vogt, NSP Mental Health Director; and Ted D'Amico, former NDOC Medical Director. *Id.*

Plaintiff alleges that he has manic depressive disorder, for which he takes medication, and has a history of "mental lapses" which cause him to violate prison policies. *Id.* In counts I and II, plaintiff alleges that defendants violated his Eighth Amendment rights by placing him in disciplinary segregation without considering his mental health status. *Id.* He alleges that his

1 placement in disciplinary segregation amounts to punishment for being mentally ill. *Id.* Plaintiff
2 additionally alleges he wrote forty medical kites requesting medical care while in disciplinary
3 segregation, but received no response. *Id.* Plaintiff further alleges that NSP has inadequate
4 mental health facilities. *Id.* Plaintiff requests housing in a mental health facility rather than in
5 segregation, where he alleges he does not receive mental health treatment, and an injunction
6 requiring defendants to establish an adequate mental health facility at NSP.¹ *Id.*

7 On November 6, 2006, defendants filed a motion for summary judgment (#82). The court
8 issued its standard *Klingele* order on November 8, 2006, which informed plaintiff of the
9 requirements for opposing a dispositive motion (#85). The order gave plaintiff fifteen days to file
10 an opposition to defendants' motion for summary judgment. *Id.*

11 Rather than submit an opposition, on November 15, 2006, plaintiff filed a motion to strike
12 defendants' motion for summary judgment, arguing that defendants filed their motion in bad faith
13 (#88). On November 17, 2006, plaintiff filed a motion for extension of time, but failed to indicate
14 for which motion he requested more time (#92). On November 22, 2006, plaintiff filed a "non-
15 opposition to court docket no 85-1," the court's *Klingele* order (#94). On December 29, 2006,
16 plaintiff filed a motion requesting professional assistance of counsel in responding to defendants'
17 motion for summary judgment (#110). On January 26, 2007, plaintiff requested a status check
18 (#116).

19 In a minute order issued April 25, 2007, the court denied plaintiff's motion to strike
20 defendants' motion for summary judgment and motion for appointment of counsel (#117). The
21 court then construed plaintiff's November 17, 2006 motion for an extension of time as a request
22 for more time to oppose defendants' motion for summary judgment, granted the motion, and gave
23 plaintiff thirty days to file an opposition. *Id.* On May 2, 2007, plaintiff filed an objection,
24 arguing that this court had no jurisdiction to issue its April 25, 2007 minute order and that the
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26 ¹ The court notes that plaintiff also requests compensatory damages in the sum of "one hundred fifty
27 million dollars" and "five hundred million dollars," and punitive damages in the sum of "one billion dollars"
28 and "five billion dollars" (#9).

1 decision was arbitrary and unfair (#118). He also requested that both the Magistrate and District
 2 Court judges recuse themselves. *Id.* On June 26, 2007, the District Court denied plaintiff's
 3 motion and request for recusal (#125). Plaintiff failed to file an opposition to defendants' motion
 4 for summary judgment (#82) within the permitted thirty days set out in this court's April 25, 2007
 5 order (#117).

6 The Court notes that the plaintiff is proceeding *pro se*. "In civil rights cases where the
 7 plaintiff appears *pro se*, the court must construe the pleadings liberally and must afford plaintiff
 8 the benefit of any doubt." *Karim-Panahi v. Los Angeles Police Dep't*, 839 F.2d 621, 623 (9th
 9 Cir. 1988); *see also Haines v. Kerner*, 404 U.S. 519, 520-21 (1972).

10 II. DISCUSSION & ANALYSIS

11 A. Discussion

12 1. Summary Judgment Standard

13 Summary judgment allows courts to avoid unnecessary trials where no material factual
 14 disputes exist. *Northwest Motorcycle Ass'n v. U.S. Dept. of Agriculture*, 18 F.3d 1468, 1471 (9th
 15 Cir. 1994). The court grants summary judgment if no genuine issues of material fact remain in
 16 dispute and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(C).
 17 The court must view all evidence and any inferences arising from the evidence in the light most
 18 favorable to the nonmoving party. *Bagdadi v. Nazar*, 84 F.3d 1194, 1197 (9th Cir. 1996). In
 19 inmate cases, the courts must

20 [d]istinguish between evidence of disputed facts and disputed
 21 matters of professional judgment. In respect to the latter, our
 22 inferences must accord deference to the views of prison
 23 authorities. Unless a prisoner can point to sufficient evidence
 regarding such issues of judgment to allow him to prevail on the
 merits, he cannot prevail at the summary judgment stage.

24 *Beard v. Banks*, ___ U.S. ___, 126 S.Ct. 2572, 2576 (2006). Where reasonable minds could differ
 25 on the material facts at issue, however, summary judgment should not be granted. *Anderson v.*
 26 *Liberty Lobby, Inc.*, 477 U.S. 242, 251 (1986).

27 The moving party bears the burden of informing the court of the basis for its motion, and
 28 submitting evidence which demonstrates the absence of any genuine issue of material fact.

1 *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). Once the moving party has met its burden,
 2 the party opposing the motion may not rest upon mere allegations or denials in the pleadings but
 3 must set forth specific facts showing that there exists a genuine issue for trial. *Anderson*, 477
 4 U.S. at 248. Rule 56(c) mandates the entry of summary judgment, after adequate time for
 5 discovery, against a party who fails to make a showing sufficient to establish the existence of an
 6 element essential to that party's case, and on which that party will bear the burden of proof at
 7 trial. *Celotex*, 477 U.S. at 322-23.

8 **E. Analysis**

9 Plaintiff filed this case on November 30, 2004 (#1). Since that time, plaintiff has filed a
 10 multitude of motions, oppositions, and replies, including numerous motions requesting that the
 11 judges in this case recuse themselves. *See* #58, #59, #63, #66, #72, #95, #104, and #118. The
 12 court found many of these motions to be baseless and/or duplicative. *See* #67, #89, #125. The
 13 sheer volume of plaintiff's filings in this case is proof that plaintiff knows how to file papers
 14 within time deadlines and in response to court orders. Despite the court's lenience in granting
 15 plaintiff extra time in which to file an opposition, *see* #117, plaintiff failed to do so.

16 Local Rule 7-2 states "The failure of an opposing party to file points and authorities in
 17 response to any motion shall constitute a consent to the granting of the motion." L.R. 7-2(d). In
 18 the *Klinge* order the court sent plaintiff, it stated:

19 If the nonmoving part fails to oppose the motion within fifteen
 20 (15) days, or if the non-moving party fails to submit evidence
 21 supporting its opposition, and if the motion for summary judgment
 22 has merit, that failure to file points and authorities in response to
 any motion shall constitute a consent to the granting of the motion.
 Local Rule 7-2(d). The court may then grant the motion and enter
 judgment. Local Rule 7-2(d).

23 (#85, p. 3).

24 Defendants argue in their motion for summary judgment that the prison system, as early
 25 as 1986, determined that plaintiff's poor adjustment to society and institutionalization was not
 26 due to any form of mental illness (#82). Rather, NDOC medical staff have determined that
 27 plaintiff feigns mental illness and threatens self-mutilation or harm to manipulate NDOC
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1 personnel. *Id.* Defendants dispute that plaintiff is a “mental health patient,” and assert that
2 plaintiff’s medical records reveal that plaintiff is not required to be permanently placed in a
3 mental health facility because he is a “cunning manipulator” who enjoys avoiding disciplinary
4 segregation. *Id.* Mental health care providers have determined that plaintiff can be treated
5 properly on an outpatient basis, and may reside in the general population. *Id.* Further, defendants
6 assert that NSP officials have provided adequate mental health services to plaintiff because
7 plaintiff is not classified as a mental health patient. *Id.* Defendants maintain that in the event of
8 an emergency, plaintiff could be transferred to the Mental Health Unit (“MHU”) at Northern
9 Nevada Correctional Center (“NNCC”) in a matter of minutes. *Id.* Moreover, while he is in
10 disciplinary segregation, defendants provide plaintiff with his daily medication, he can send
11 medical kites, and he has access to an emergency call button. *Id.* As to plaintiff’s allegations that
12 he was not evaluated before being released from the MHU and sent back to NSP in March 2004,
13 defendants submit proof that the mental health professionals did evaluate plaintiff and followed
14 prison procedures. *Id.*

15 A review of plaintiff’s medical records confirms defendants’ assertions. The court
16 concludes that defendants’ motion has merit. Plaintiff has been duly warned of the consequences
17 of failing to oppose defendants’ motion for summary judgment, and has proved himself to be a
18 capable *pro se* litigant. Pursuant to Local Rule 7-2, the court concludes that the plaintiff consents
19 to each of defendants’ arguments. The court grants summary judgment on all counts.

20 III. CONCLUSION

21 Based on the foregoing and for good cause appearing, the court concludes that defendants’
22 motion for summary judgment has merit and that by failing to oppose, plaintiff consents to each
23 of defendants’ arguments. As such, the court recommends that defendants’ motion for summary
24 judgment (#82) be **GRANTED**.

25 The parties are advised:

26 1. Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule IB 3-2 of the Local Rules of Practice,
27 the parties may file specific written objections to this report and recommendation within ten days
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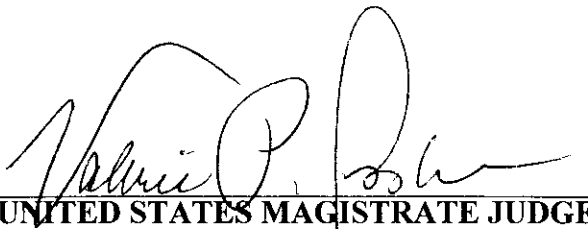
1 of receipt. These objections should be entitled "Objections to Magistrate Judge's Report and
2 Recommendation" and should be accompanied by points and authorities for consideration by the
3 District Court.

4 2. This report and recommendation is not an appealable order and any notice of appeal
5 pursuant to Fed. R. App. P. 4(a)(1) should not be filed until entry of the District Court's
6 judgment.

7 **IV. RECOMMENDATION**

8 **IT IS THEREFORE RECOMMENDED** that recommends that defendants' motion for
9 summary judgment (#82) be **GRANTED**.

10 **DATED:** July 6, 2007.

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13 **UNITED STATES MAGISTRATE JUDGE**
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